

**UNPUBLISHED**

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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**No. 95-2821**

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ELOISE Q. SMITH (Widow of Kirby A. Smith),

Petitioner,

versus

EASTERN ASSOCIATED COAL CORPORATION; DIRECTOR,  
OFFICE OF WORKERS' COMPENSATION PROGRAMS,  
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

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On Petition for Review of an Order of the Benefits Review Board.  
(95-1236-BLA)

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Submitted: June 11, 1996

Decided: August 14, 1996

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Before WIDENER, NIEMEYER, and LUTTIG, Circuit Judges.

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Affirmed by unpublished per curiam opinion.

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Frederick K. Muth, HENSLEY, MUTH, GARTON & HAYES, Bluefield, West Virginia, for Petitioner. Mark E. Solomons, Thomas H. Odom, ARTER & HADDEN, Washington, D.C., for Respondents.

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Unpublished opinions are not binding precedent in this circuit.  
See Local Rule 36(c).

PER CURIAM:

Eloise Smith petitions for review of a decision of the Benefits Review Board (Board) affirming an administrative law judge's (ALJ) decision to deny her request for black lung benefits pursuant to 30 U.S.C.A. § 901-45 (West 1986 & Supp. 1996). In his final decision, the ALJ found the evidence of record sufficient to establish invocation of the interim presumption of entitlement pursuant to 20 C.F.R. § 727.203(a)(2) (1996), but also sufficient to establish rebuttal pursuant to § 727.203(b)(3) and (4). The Board affirmed the ALJ's finding of rebuttal under subsection (b)(4) as unchallenged on appeal, and found it unnecessary to address subsection (b)(3), as the ALJ's finding under subsection (b)(4) precluded entitlement on both Smith's survivor's claim and a miner's claim previously filed by Smith's deceased husband.

Smith's failure to challenge the ALJ's finding of subsection (b)(4) rebuttal before the Board results in waiver of her right to review of that issue by this Court. See Big Horn Coal Co. v. Director, Office of Workers' Compensation Programs, 897 F.2d 1052, 1054 (10th Cir. 1990); South Carolina v. United States Dep't of Labor, 795 F.2d 375, 378 (4th Cir. 1986); Cox v. Benefits Review Bd., 791 F.2d 445, 446-47 (6th Cir. 1986). Because the ALJ's finding of subsection (b)(4) rebuttal precludes entitlement, we affirm the decision of the Board. We dispense with oral argument because the facts and legal contentions are adequately presented in the mate-

rials before the court and argument would not aid the decisional process.

AFFIRMED